

LIBRARY
SUPREME COURT U.S.

Wm. Sullivan Co. U.S.
P. 100

NOV 18 1948

CHAS. E. ROY
ALBANY

State of Georgia v. The United States

OCTOBER TERM, 1948

ALFRED W. JONES, ATTORNEY FOR GEORGIA & FLORIDA
BALTIMORE, MARYLAND

The United States

IN DEFENSE OF THE STATE OF GEORGIA & FLORIDA
IN THE
SUPREME COURT OF THE UNITED STATES

ALFRED W. JONES, ATTORNEY FOR GEORGIA & FLORIDA
BALTIMORE, MARYLAND

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	2
Conclusion	6
Appendix	7

CITATIONS

Cases:

<i>Albrecht v. United States</i> , 329 U. S. 599	4
<i>Federal Power Commission v. Hope Gas Co.</i> , 320 U. S. 591	5
<i>Federal Power Commission v. Natural Gas Pipeline Co.</i> , 315 U. S. 575	5
<i>Munn v. Illinois</i> , 94 U. S. 113	5
<i>Nebbia v. New York</i> , 291 U. S. 502	5
<i>New York v. United States</i> , 331 U. S. 284	5
<i>United States v. Thayer-West Point Hotel Co.</i> , 329 U. S. 585	4
<i>United States v. William V. Griffin and Hugh William Purvis, Receivers for Georgia & Florida Railroad</i> , No. 135, this Term	2

Constitution and Statutes:

Fifth Amendment of the Constitution of the United States	2, 3, 4
Railway Mail Pay Act (Act of July 28, 1916, 39 Stat. 412 <i>et seq.</i> , 39 U. S. C. 523 <i>et seq.</i>):	
Sec. 524	7
" 525	7
" 527	7
" 530	8
" 531	8
" 541	4, 9
" 542	9
" 543	9
" 547	10
" 549	10

Constitution and Statutes—Continued

	Page
" 553	11
" 554	11
" 557	11
" 563	12
" 565	12
49 U. S. C. 1(4)	4
Section 177 (a) of the Judicial Code (28 U. S. C., 1946 ed., 284(a), now 28 U. S. C. 2516)	3

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 198

ALFRED W. JONES, RECEIVER FOR GEORGIA & FLORIDA
RAILROAD, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 36) is reported at 77 F. Supp. 197.

JURISDICTION

The judgment of the Court of Claims was entered on April 5, 1948 (R. 50). The time for filing a petition for certiorari was extended to August 14, 1948 (R. 195). The petition for certiorari was filed on August 5, 1948. The juris-

dition of this Court is invoked under the provisions of Section 3(b) of the Act of February 13, 1925, as amended (now 28 U. S. C. 1255).

QUESTION PRESENTED

Whether the requirement of the Railway Mail Pay Act that railway common carriers transport mail for "fair and reasonable compensation", as determined by the Interstate Commerce Commission, constitutes a taking of private property for public use within the meaning of the Fifth Amendment so as to entitle petitioner to recover interest from the United States, as an element of just compensation, for the delay in payment of fully compensatory rates.

STATUTE INVOLVED

The relevant portions of the Railway Mail Pay Act (Act of July 28, 1916, 39 Stat. 412 *et seq.*, 39 U. S. C. 523 *et seq.*) are set forth in the Appendix.

STATEMENT

Petitioner seeks review of the same judgment as that involved in *United States v. William V. Griffin and Hugh William Purvis, Receivers for Georgia & Florida Railroad*, No. 135, this Term. The "Statement" in the Government's petition in No. 135 (pp. 3-15) is equally applicable in this case and, therefore, will not be repeated.

ARGUMENT

Petitioner here contends that the Court of Claims erred in refusing to allow interest on the

principal amount which that Court awarded to petitioner as compensation for the carriage of mail. In support of this claim for interest, petitioner asserts that the Court of Claims' determination of the mail pay due to petitioner involved the determination of just compensation under the Fifth Amendment, thus removing the case from the prohibition of Section 177(a) of the Judicial Code. (28 U.S.C. [1940 ed.] 284(a) against the allowance of interest on claims prior to the rendition of judgment by the Court of Claims.¹ Admittedly, if there had been a taking of petitioner's property in the eminent domain sense, interest from the date of taking to the date of payment would be an element of the "just compensation" required by the Constitution. However, the Court of Claims held that it was giving effect to an order of the Interstate Commerce Commission, rather than determining just compensation, and that interest was therefore not allowable (R. 49).

The Government's petition in No. 135 questions the jurisdiction of the Court of Claims to review orders of the Interstate Commerce Commission fixing railway mail compensation. We anticipate that petitioner will advance the eminent domain theory in No. 135 in support of this jurisdiction.

¹Section 177(a) is now embodied in 28 U. S. Code, section 2516. Prior to September 1, 1948, it read as follows: "No interest shall be allowed on any claim up to the time of rendition of judgment by the Court of Claims, unless, upon a contract expressly stipulating for the payment of interest."

as well as in support of its claim for interest. Rejection of that theory in No. 135 would dispose of petitioner's claim for interest. *Albrecht v. United States*, 329 U. S. 599, 602; *United States v. Thayer-West Point Hotel Co.*, 329 U. S. 585, 588. Since it thus appears that the underlying issue may be common to both cases, the Government does not oppose the granting of the petition for certiorari in this case if the Court decides to review the merits in No. 135.

If the Court should deny the Government's petition in No. 135, however, we believe the petition here should also be denied because the court below was correct in holding that it was not determining "just compensation" in a proceeding under the Fifth Amendment. (R. 49). There is no showing that the railroad was required to remain in operation, that it was required to run any trains specially for the mail service, or that it was required to add any cars to regularly scheduled trains to transport the mails. On the contrary, the evidence points to the fact that it was not required to assume additional burdens and that authorizations to carry mail were continued to aid the road's precarious financial condition (R. 94, 97, 100, 113, 115-116).

The statutory requirement that railway common carriers transport the mails (39 U. S. C. 541), does not differ significantly from the duty imposed upon carriers generally to furnish transportation service "upon reasonable request therefor." 49 U. S. C. 1(4). The duty to carry the mails at

fair and reasonable rates of compensation determined after administrative hearings does not, therefore, involve a taking of private property for public use any more or any less than the equivalent duty of common carriers by rail to transport freight for the public. It seems clear, however, that the determination of reasonable rates at which utilities are required to serve the public is properly considered a regulation of the use of property within the scope of the police power. *Federal Power Commission v. Hope Gas Co.*, 320 U. S. 591, 601; *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 582; *Munn v. Illinois*, 94 U. S. 113, 134; cf. *Nebbia v. New York*, 291 U. S. 502, 534-539. The limited scope of judicial review in railroad rate cases (see, e. g. *New York v. United States*, 331 U. S. 284, 331, 349) and the recognition that rate-making is essentially a "legislative power" (*Munn v. Illinois*, *supra*, at 133-134; *Federal Power Commission v. Natural Gas Pipeline Co.*, *supra*, at 586) are inconsistent with the view that the regulatory measures constitute an exercise of the power of eminent domain. Thus the opinion of Mr. Chief Justice Stone in the *Natural Gas Pipeline* case, states (p. 586):

The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been designated are free, within the ambit of their statu-

tory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, *the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped.* If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result; our inquiry is at an end. [Italics supplied.]

We submit accordingly that the court below was correct in holding that determination of reasonable rates for transporting the mails did not involve the question of a taking of private property for public use, and that the question which petitioner here seeks to raise, does not of itself, warrant review.

CONCLUSION

While we do not oppose the granting of the petition in the instant case if the Government's petition in No. 135 is granted, it is respectfully submitted that the instant petition for a writ of certiorari should be denied if the petition in No. 135 is denied.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Assistant Attorney General.

PAUL A. SWEENEY,

MORTON LIFTIN,

NOVEMBER, 1948

Attorneys.

APPENDIX

The following sections of Title 39 in the U. S. Code are sections of the so-called "Railway Mail Pay Act" (Act of July 28, 1916, 39 Stat. 412, 425-431):

§ 524. Conditions of railway service; adjustment of compensation:

The Postmaster General is authorized and directed to adjust the compensation to be paid to railroad companies for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and at the rates hereinafter provided.

§ 525. Classes of routes enumerated:

The Postmaster General may state railroad mail routes and authorize mail service thereon of the following four classes, namely: Full railway post-office car service, apartment railway post-office car service, storage-car service, and closed-pouch service.

* * * * *

§ 527. Apartment railway post-office car service.

Apartment railway post-office car mail service shall be service by apartments less than forty feet in length in cars constructed, fitted up, and maintained for the distribution of mails on trains. Two standard sizes of apartment railway post-office cars may be authorized and paid for, namely, apartments

fifteen feet and thirty feet in length, inside measurement, except as hereinafter provided.

* * * * *

§ 530. Closed-pouch service.

Closed-pouch mail service shall be the transportation and handling by railroad employees of mails on trains on which full or apartment railway post-office cars are not authorized, except as hereinbefore provided. The authorizations for closed-pouch service shall be for units of seven feet and three feet in length, both sides of car.

§ 531. Rates of payment for classes of routes.

The rates of payment for the services authorized in accordance with sections 524-541, 542-568 of this title shall be as follows, namely:

* * * * *

(b) *Apartment railway post-office car service.*

For apartment railway post-office car mail service at not exceeding 11 cents for each mile of service by a thirty-foot apartment car and 6 cents for each mile of service by a fifteen-foot apartment car.

* * * * *

(d) *Closed-pouch service.*

For closed-pouch service, at not exceeding 11½ cents for each mile of service when a three-foot unit is authorized, and 3 cents for

each mile of service when a seven-foot unit is authorized.

§ 541. Transportation required in manner, under conditions, and with service prescribed by Postmaster General; compensation therefor.

All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.

§ 542. Interstate Commerce Commission to fix and determine rates and compensation.

The Interstate Commerce Commission is empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until changed by the commission after due notice and hearing.

§ 543. Relation between the railroads as public-service corporations and the Government to be considered.

In fixing and determining the fair and reasonable rates for such service the commission shall consider the relation existing between the railroads as public-service corporations and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroads.

* * * * *

§ 547. Notice by Interstate Commerce Commission to railroads; answer of railroads; hearings.

Thereupon the commission shall give notice of not less than thirty days to each carrier so required to transport mail and render service, and upon a day to be fixed by the commission, not later than thirty days after the expiration of the notice herein required, each of said carriers shall make answer and the commission shall proceed with the hearing as provided by law for other hearings, between carriers and shippers or associations.

* * * * *

§ 549. Classification of carriers by Interstate Commerce Commission.

For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification.

* * * * *

§ 553. Applications for reexaminations.

Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination, and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein.

§ 554. Powers conferred on Interstate Commerce Commission.

For the purposes of sections 524-541, 542-568 of this title the Interstate Commerce Commission is vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers.

* * * * *

§ 557. Information from Interstate Commerce Commission as to revenues from express companies; rates for transporting matter other than first class.

The Postmaster General shall, from time to time, request information from the Interstate Commerce Commission as to the revenue received by railroad companies from express companies for services rendered in the transportation of express matter, and may, in his discretion, arrange for the transportation of mail matter other than of the first class at rates not exceeding those so ascertained and reported to him, and it shall be the duty of the railroad companies to carry such mail mat-

ter at such rates fixed by the Postmaster General.

* * * * *

§ 563. Refusal to perform service at rates or methods of compensation provided by law.

It shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General so to do, and for such offense shall be fined \$1,000. Each day of refusal shall constitute a separate offense.

* * * * *

§ 565. Special contracts for transportation; reports of.

The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates than those specified in sections 524-541, 542-568 of this title.